Filed 12/18/08 Chaidez v. Sarner Enterprises CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TOMASA CHAIDEZ, Plaintiff and Respondent, v. SARNER ENTERPRISES, INC., Defendant and Appellant.	B203797 (Los Angeles County Super. Ct. No. BC372020)

APPEAL from an order of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Hill, Farrer & Burrill and E. Sean McLoughlin for Defendant and Appellant.

Alfonso & Hoyng, Frank A. Alfonso, and Francisco A. Hoyng for Plaintiff and Respondent.

Sarner Enterprises, Inc. (Sarner) appeals from the trial court's denial of its petition to compel arbitration of a lawsuit filed by Tomasa Chaidez, a Sarner employee. It contends that the trial court was required to order arbitration pursuant to the agreement Chaidez signed. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2007, Chaidez filed a class action lawsuit, alleging fraud, breach of contract, and violations of the Labor Code relating to wages and hours. On June 8, the complaint was served by substituted service, as it was left with an individual identified as a Sarner manager.

In July 2007, Sarner implemented its Mutual Arbitration Policy (MAP). On July 6, 2007, Joel Sarner met with Chaidez to discuss the new policy.[1] Chaidez was given English and Spanish versions of the notice to Sarner employees concerning the MAP. Chaidez has a limited ability to communicate verbally in English, but is unable to read it. Elena Reveles, a Sarner employee who is fluent in English and Spanish, served as a Spanish language interpreter. She also was present to answer Chaidez's questions regarding the MAP. Joel Sarner and Reveles claimed that at the end of the meeting, Chaidez said she understood the arbitration policy and signed the English version of the "Employee Agreement to Arbitrate." The parties do not dispute that although there is a Spanish version of the same agreement to arbitrate, Chaidez did not sign it.

The notice given to Chaidez informed her that the MAP "will govern all existing or future disputes between you and the Company that are related in any way to your employment," and that "[y]our decision to accept employment or to continue

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[1] Sarner contends it was not served until Chaidez's counsel mailed a copy of the complaint on July 16. Nonetheless, at the hearing on Sarner's petition to compel arbitration, Sarner's counsel conceded "the company was aware of the existence of the dispute" when it promulgated its MAP. More to the point, Sarner does not claim it did not know Chaidez's lawsuit was filed prior to the July 6 meeting.

employment with the Company constitutes your agreement to be bound by the MAP." It is undisputed that Chaidez continued to work for Sarner after the July 6 meeting.

In August 2007, Sarner's counsel sent a letter to Chaidez's counsel requesting to arbitrate the lawsuit pursuant to the MAP. Chaidez's attorney declined. On September 4, 2007, Sarner filed its petition to compel arbitration. The matter was set for an October 17 hearing.

On October 1, Chaidez filed late opposition to the petition, which the court accepted. Chaidez filed a declaration disputing Joel Sarner's and Elena Reveles's accounts of the July 6 meeting. She claimed that after she read the Spanish version of the arbitration notice, she informed Joel Sarner in Spanish, with Reveles acting as an interpreter, that she would not agree to submit the pending lawsuit to arbitration. She advised Joel Sarner that she would not sign any document related to her lawsuit without having her attorney review it. She admitted Mr. Sarner handed her what she now knew to be the English version of the agreement to arbitrate. She signed the document only after he represented it was simply an acknowledgment that she had received the company's arbitration policy and not an agreement to arbitrate. Chaidez asserted that at no time did she understand she was foregoing her right to a jury trial on the pending dispute, and declared she specifically told Joel Sarner she would not do so.

On October 17, after hearing argument, the trial court adopted its tentative ruling denying Sarner's petition. The court concluded there had been no meeting of the minds between the parties as to whether the MAP applied to the pending lawsuit. It accepted "the uncontradicted evidence" that "Chaidez expressly excepted her pending lawsuit from the agreement." The court noted that at the time of the July 6 meeting, she had a lawyer who had filed a lawsuit on her behalf. Thus, it made no sense that she would have abandoned her right to try the case in court without speaking to her lawyer. Alternatively, the court determined that compelling arbitration would be against public policy. It found that a party with an existing jury trial right should not be deemed to have waived that right absent an express reference to the lawsuit in a subsequent arbitration agreement.

This timely appeal followed.

DISCUSSION

I. The Court Properly Decided the Issue of Arbitrability

Sarner asserts the trial court was required to submit the question as to whether the current dispute was covered by the MAP to the arbitrator. Sarner contends that the court found the parties had a binding agreement to arbitrate. It points out that the MAP provides that the rules of the American Arbitration Association are to govern the procedures to be used in arbitration. Relying on *Qualcomm Inc. v. Nokia Corp.* (2006) 466 F.3d 1366, 1372-1373, Sarner argues the parties' incorporation of those rules is evidence that they clearly intended to delegate the issue of arbitrability to an arbitrator.

The flaw in Sarner's analysis is that the court did not determine the parties had a valid agreement to arbitrate. The court merely stated "[t]here may well have been an agreement to arbitrate future disputes." We decline to interpret the court's advisory (and unnecessary) reference to some future event as a finding that the parties agreed to arbitrate their disputes.

Thus, it was for the court to determine the threshold issue as to whether the parties had a valid arbitration agreement. (*Green Tree Fin. Corp. v. Bazzle* (2003) 539 U.S. 444, 452.)

II. The Parties Did Not Agree to Arbitrate the Lawsuit

Sarner's approach to the question whether Chaidez agreed to arbitrate the lawsuit is simple. She signed the agreement to arbitrate, thus she is bound by it. It asserts that even if the language of the MAP is ambiguous, "the [Federal Arbitration Act] and controlling federal law require such ambiguity to be resolved in favor of compelling arbitration of this case." We must keep in mind, however, that an arbitration agreement, like any other contract, is to be enforced according to its terms. (*Volt Info. Scis. v. Bd. of Trs.* (1989) 489 U.S. 468, 479.) While we acknowledge the strong public policy favoring

arbitration, "'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable.'" (*Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1199, quoting *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481.)

In pursuing its petition to compel arbitration, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) Where, as here, the court has considered extrinsic evidence and made factual determinations, "we review the record for substantial evidence to support the finding." (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701.)

The trial court weighed the evidence, found Chaidez credible, and concluded there was no meeting of the minds between the parties as to whether the dispute underlying the filed lawsuit was subject to arbitration. Substantial evidence supports that finding. Chaidez expressly denied agreeing to arbitrate the claims that were the subject of her complaint. She declared she clearly informed her employer she would not do so, and refused to sign any documents related to her lawsuit without the input of her hired counsel. On the other hand, neither Joel Sarner nor Elena Reveles disputed Chaidez's claim. Joel Sarner merely asserted that he did not affirmatively tell Chaidez that "any disputes would not be subject to the new policy" or that "any pending claims or disputes could proceed in court." This is a far cry from saying that the parties agreed to arbitrate the pending lawsuit. As for Reveles, not only does she fail to refute Chaidez's claim that she refused to arbitrate her lawsuit, her declaration does not mention the pending lawsuit that Sarner knew existed.

The trial court's finding also is supported by what is not present in this case. It is undisputed that Chaidez does not read English. If, as Sarner contends, Chaidez knowingly and intelligently agreed to arbitrate the pending lawsuit, it would have been a simple matter to obtain her signature on the Spanish version of the agreement to arbitrate.

In addition, we note that Reveles's carefully worded declaration says that Chaidez "said she understood the new arbitration policy and she would sign the 'Employee Agreement to Arbitrate.'" Conspicuously absent is a statement by Reveles that Chaidez said she understood the substance of the agreement to arbitrate or realized that by signing the document she was agreeing to arbitrate all disputes with her employer, including the current lawsuit.

Sarner contends the trial court ignored the objective manifestation of the parties' intent as evidenced by the plain language of the MAP. It asserts the court erred by allowing the express language of the MAP to be modified or nullified by Chaidez's oral statements of her intent. The problem with Sarner's argument is that it assumes a fact the trial court rejected—that the parties had an agreement with regard to the arbitrability of the underlying lawsuit that Chaidez was attempting to modify. Because the court found the written agreement was not the result of a meeting of the minds between the parties, it properly refused to grant Sarner's petition. (See *Winter v. Window Fashions Professionals, Inc.* (2008) 166 Cal.App.4th 943, 949-951.)

III. Sarner's Other Contentions

Sarner raises three other objections to the trial court's ruling, none of which has merit. It claims the court erred by denying Sarner's request to present live testimony and cross-examine Chaidez. The receipt of oral testimony at a hearing on a petition to compel arbitration is not a procedural requirement, but is taken only in the court's discretion. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.) Sarner does not attempt to establish that the court's denial to take live testimony constituted an abuse of discretion.

Sarner suggests that the Federal Arbitration Act, in particular section 4 of title 9 of the United States Code, requires a jury trial on the issue of whether a valid agreement to arbitrate exists. However, that section applies to petitions to compel arbitration filed in a United States District Court, and provides that in certain circumstances, "the party

alleged to be in default" (in our case Chaidez) may demand a jury trial. (9 U.S.C. § 4.) Clearly, that section has no application here.

Finally, Sarner asserts the court should not have considered Chaidez's late response to its petition to compel. In the absence of a showing of prejudice (which Sarner does not address), the trial court had the discretion to consider Chaidez's untimely response to the petition. (*MJM, Inc. v. Tootoo* (1985) 173 Cal.App.3d 598, 603.)

DISPOSITION

The trial court's order denying Sarner's petition to compel arbitration is affirmed. Chaidez is awarded her costs on appeal.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.